No. 4093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of the estate of David H. Cascaden, deceased, substituted plaintiff for David H. Cascaden and Blanche Cascaden, as guardian of the estate of David H. Cascaden, an insane person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

PETITION OF DEFENDANT IN ERROR FOR A REHEARING OF DECISION ON COUNTERCLAIM.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Defendant in error respectfully petitions this court for a rehearing hereof insofar as the decision on the counterclaim is concerned, and begs leave to submit the following:

The making, execution, and delivery by Cascaden and Petree of the two thousand ($2,000) dollar note to Weber is admitted in the pleadings (Tr. p. 18), but it is affirmatively alleged (1) that there was no consideration, (2) that the consideration failed (Tr. pp. 18 and 19).

The *burden* then was on Cascaden *to introduce evidence* tending to sustain one or the other of these defenses. We submit that there was no evidence to sustain either defense.

No evidence of no consideration.

The first mention in the evidence of the two thousand ($2,000) dollar note is on page No. 35 of the record. This was on the direct examination of Weber. On that examination (pages 35, 36 and 37 of the Tr.), there is certainly *nothing tending to show no consideration.* Weber is asked by his counsel to "explain that note", and he explains it, and the sum total of the explanation is found on p. 37 of the Tr. viz.:

> "Q. Then, as I understand, before you left you and Petree figured up the business between you? A. Yes.
>
> Q. And this note was the evidence of how you and Petree stood at that time personally? A. Yes sir."

Plaintiff relies on the cross-examination of Weber, but we submit that the cross-examination does not tend in the slightest degree to show that there was

no consideration. That cross-examination develops the fact that Weber was the practical brewer and that he left the financial matters, even his own interests, to Petree and Cascaden, in whom he had full confidence. He is the one who was sent "outside" to learn the "new process" (Tr. p. 36), and he says:

> "I didn't keep any track of my accounts. I had my head full of changing the business from one to the other, *and I had full confidence in Mr. Petree and Mr. Cascaden*, personally and financially. That time I didn't know how Mr. Petree stood.
>
> Q. And Mr. Petree had enough confidence, did he, in letting you just take the figures out of your head, and saying 'You owe me two thousand dollars', and he gave you that note?
>
> A. *It was Mr. Petree's, not mine"* (Tr. p. 48).

The cross-examination developed the fact that Weber was unused to business, and unused to the witness stand, but it also devoloped that he was essentially honest and without guile, for otherwise he could easily have manufactured another consideration, as both Petree and Cascaden were dead.

We know that Petree owed Weber money (Tr. p. 64), and even if it be conceded, for the sake of the argument, that Weber was "shaken all to pieces", that he was shown to be falsifying—that what he says was the consideration *was not the consideration*, still that would be very far from saying that there was evidence that there was *no* considera-

tion; *and yet,* unless the maker of the note produces *evidence* that there was *no* consideration, evidence as to the existence of a *particular* consideration, however weak and unsatisfactory it may be, will not avail; for *there is the note* in the hands of the payee —no suspicion that he came by it dishonestly— *there is the signature, there is the promise, there is the unrebutted presumption of consideration,* which must obtain in the absence of evidence *to the contrary.* The "contrary" is *"no"* consideration, not simply *"not that"* consideration.

The payee of a note, (the possession of which by him is not impugned), might not be able to give any coherent account of the transactions leading up to it; the account which he does give of the consideration may be weak and unsatisfactory, wildly extravagant, palpably untrue, clearly impossible, still that fact would be evidence only of the falsity of that particular account. It would be no evidence of the *non-existence of a true account* showing consideration.

If this cause had been submitted to the jury and they had found specifically "no consideration", upon what evidence could such a finding be said to be based? The jury could only say, "Weber's testimony as to what was the consideration was weak and unsatisfactory, and Cascaden and Petree, the makers of the note, are both dead; therefore, we find that the preponderance of evidence is that

there was *no* consideration". And this, notwithstanding the fact that men do not usually sign and deliver notes for two thousand ($2000) dollars without consideration, notwithstanding possession of the note by the payee—a possession unaccompanied by any suspicious circumstances—and notwithstanding the well known presumption of law.

That plaintiff did not consider the testimony of Weber as to a *particular* consideration as being evidence of *no* consideration, is shown by the fact that he relies on Weber's alleged admissions as showing that there *was* another consideration—a consideration which, it is claimed, has failed.

Cascaden and Petree are both dead, it is true, but this is not a case of the living taking advantage of the fact that the lips of the responsible maker of the note are closed by death. It would seem, rather, that the representatives of the dead are seeking to "put something over" on the living. The suit is brought on notes due June 25, 1918, and December 25, 1918, respectively. Cascaden was not declared insane until August 26, 1921. If he had thought he had a good cause of action on either note, it is not to be presumed that he would have forborne for three years to take legal measures to collect. He made no effort to collect during his sanity, but his guardian, finding the notes among his papers, begins this suit, notwithstanding the fact that the resolutions of the Beverage Company, signed by Cascaden, show clearly that there is no

cause of action on the three thousand ($3000) dollar note.

Failure of consideration. No evidence.

On this defense the only evidence is that Mrs. Cascaden said that Weber admitted to her:

> "Two thousand ($2000) dollars was to secure George in 1918, February 6th, when he left for outside against a balance of three thousand ($3000) dollars, note due Ahlberg" (Tr. p. 71),

and that Weber's denial of having made that omission is "weak and unsatisfactory."

Let it be conceded as a fact that Weber made that admission in the very words used by Mrs. Cascaden. The Alaska Code provides that the jury must be instructed that the oral admissions of a party are to be received with caution (C. L. A. 1913, Sec. 1505, Sub. 4), and surely, an oral admission is not to be construed to mean anything beyond what its language expresses or obviously implies.

If this was the consideration, it was a good consideration, and there is no testimony that it has failed. If it means (and in the nature of things it could mean nothing else), that Weber was liable (as between him and Petree and Cascaden), for only one-third of the three thousand ($3000) dollar Allberg note and that the two thousand ($2000) dollar note was given to protect him against being compelled to pay the whole of the Allberg note, then the consideration, so far from failing, is very much alive, because that liability is not at an end—

the Allberg note is still unpaid and Weber is liable for the whole of it (Defendants' Brief, pp. 15 and 16).

We submit then, that there was *no* evidence of *no* consideration and *no* evidence of failure of consideration, and so nothing for the jury to pass on.

COSTS.

If the petition for rehearing should be denied, then defendant in error asks this court to make an order apportioning between the parties the costs of the appellate proceeding, for the following reason:

The gist of this court's decision is that the ruling of the lower court is affirmed as to the first cause of action, which involves three thousand thirty-three ($3033) dollars, but reversed as to the counterclaim, which involves one thousand five hundred ($1500) dollars. The case is remanded for a new trial, on the counterclaim only.

The printed record embraces 197 pages (including covers), costing two hundred and eighty-two dollars and forty ($282.40) cents, and the charge of the clerk of the lower court for preparing the transcript was seventy dollars and fifty-five ($70.55) cents.

Approximately one-half of these items was for matter which relates exclusively to the first cause of action.

It is submitted that defendant in error ought not to be taxed with that portion of the costs which

pertains solely to the first cause of action, on which he prevailed. Instead of bringing separate action, as he might have done, on the counterclaim, he chose, in the interest of lessened expense and annoyance, to try it all in one suit. For this he ought not to be penalized.

Dated, San Francisco,
January 9, 1924.

Respectfully submitted,
R. F. Roth,
Robert W. Jennings,
Attorneys for Defendant in Error and Petitioner.

I hereby certify that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.

Dated, San Francisco,
January 9, 1924.

Robert W. Jennings,
Attorney for Defendant in Error and Petitioner.